No. 82-1795

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

*Petitioners,*

v.

RICHARD A. CRISP, DIRECTOR
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF THE AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, ASSOCIATION OF NATIONAL ADVERTISERS AND THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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### INTEREST OF AMICI CURIAE

This brief is submitted jointly by the American Advertising Federation, the American Association of Advertising Agencies (AAAA), the Association of National Advertisers (ANA) and the Outdoor Advertising Association of America (OAAA) as amici curiae. Amici have secured the consent of each party to the filing of this brief.

*See* Appendix. Amici support the position of appellants in this case and urge reversal of the decision below.

The American Advertising Federation is a national trade association which includes within its membership representatives of all of the various elements of the advertising industry. The membership of the Federation includes companies which manufacture and sell consumer products, advertising agencies, outdoor advertising companies, newspaper and magazine publishers, radio and television broadcasters and networks and approximately 22 other trade associations with memberships composed of companies engaged in various advertising pursuits. The Federation is also the parent body of more than 200 local advertising clubs and federations located throughout the United States which have a combined membership of approximately 25,000 advertising practitioners.

The American Association of Advertising Agencies is the national association of the advertising agency industry. The AAAA has more than 590 members which include both large and small advertising agencies located throughout the United States. These companies are responsible for approximately 75 percent of all national advertising placed by advertising agencies in this country as well as a great deal of the local and regional advertising in the United States.

The Association of National Advertisers is a national association comprised of approximately 400 companies located throughout the United States which manufacture and sell a wide range of products and which employ advertising as an important element of their marketing and public relations programs. Although the ANA's membership includes many of the nation's largest advertisers, it also includes a large number of smaller advertisers who

expend less than $1 million annually for advertising. The common characteristic of all ANA members is that they purchase space and time from the media of mass communications for proprietary advertising.

The OAAA is the trade association of the standardized outdoor advertising industry in the United States. Outdoor advertisers maintain off-premise posters and painted bulletins which disseminate commercial and noncommercial messages that do not pertain to activities conducted on the premises on which the outdoor advertising signs are located. The OAAA's membership is composed of one hundred sixty-nine companies which serve 7,900 distinct local areas throughout the United States.

The combined membership of amici are responsible for the majority of advertising expenditures in the United States. In addition each of the amici has members that are located within the State of Oklahoma or place advertising in media within the state. A substantial number of these members are directly affected by the Oklahoma statutes at issue in this case and have been prohibited from disseminating alcoholic beverage advertising.

Amici have a direct interest in this case because it presents the issue of whether a state may totally suppress commercial speech regarding a product which may be sold lawfully within the state. If the Court's disposition of this appeal reaches this issue, the Court's opinion will determine whether the Twenty-first Amendment compromises the protection afforded to commercial speech by the First and Fourteenth Amendments, and may also delineate the more general circumstances under which a state may prohibit truthful advertising of any lawful product or service. The business of each Amici's membership is the dissemination of commercial speech. As a result, the Court's decision in this case will have a deci-

sive impact upon them insofar as it treats commercial speech issues.

## ARGUMENT

This case is overshadowed by the Twenty-first Amendment and the traditional discretion accorded to the states in regulating commerce with respect to alcoholic beverages. *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132 (1939). In upholding Oklahoma's total prohibition of the advertising of alcoholic beverages, the Tenth Circuit yielded to the undertow of that tradition and extended the special police powers inherent in the Twenty-first Amendment beyond direct regulation of commerce to allow a State to negate fundamental First Amendment rights.

The decisions of this Court have rejected state actions which proscribe rights guaranteed by the Bill of Rights and the Fourteenth Amendment under the guise of Twnety-first Amendment regulation. The deference accorded state regulation of intoxicating beverages because of the Twenty-first Amendment is properly limited to the exercise of police powers that might otherwise be in conflict with the Commerce Clause. Certainly, such deference does not provide a rationale for state action which would completely prohibit protected commercial speech.

The very fact that the Twenty-first Amendment greatly enlarges state police powers to directly control the sale, consumption and transportation of alcoholic beverages undercuts the Tenth Circuit's conclusion that the Oklahoma advertising ban is no more extensive than necessary to further the state's interest in temperance. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Given the broad spectrum of alternative means available to Oklahoma to control the sale of alcoholic beverages, it is difficult to envision how

the total prohibition of protected commercial speech regarding these products could constitute the least restrictive method of restraining alcohol consumption.

## I. THE TWENTY-FIRST AMENDMENT DOES NOT GIVE A STATE AUTHORITY TO REGULATE COMMERCIAL SPEECH IN A MANNER THAT WOULD OTHERWISE BE UNCONSTITUTIONAL

The Tenth Circuit's decision hinges on its conclusion that the Twenty-first Amendment gives a state the power to compromise constitutional rights granted by the First and Fourteenth Amendments. A review of decisions by this Court interpreting the Twenty-first Amendment establishes that the Amendment simply gave the states added police power to control the sale and distribution of intoxicating liquor by creating an exception to the Commerce Clause. However, that authority does not give the states a carte blanche to extend into areas of regulation otherwise precluded by the Bill of Rights and the Fourteenth Amendment.

### A. The Twenty-first Amendment Does Not Authorize A State To Eliminate Rights Guaranteed By The Bill Of Rights

This Court has already determined that the scope of the Twenty-first Amendment is confined to regulatory activity which has a direct linkage to alcoholic beverage control and that the force of that Amendment becomes quickly attenuated when this activity impinges on fundamental rights. In *Craig* v. *Boren*, 429 U.S. 190 (1976), this Court refused to accord any deference based on the Twenty-first Amendment to an Oklahoma gender based restriction on the sale of alcoholic beverages.

This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of alcohol is concerned". . . . Any departures from this historical view have been limited and sporadic. [Citations omitted]

*Id.* at 429 U.S. 206.

In *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), this Court held unconstitutional a Wisconsin law that allowed local officials to summarily prohibit sales or gifts of alcoholic beverages to individuals. In that decision, the Court expressly rejected Twenty-first Amendment considerations as having any weight and held that the law violated the due process rights of the individuals involved. During the last term of the Court, a Massachusetts liquor control law was reviewed which permitted religious institutions to veto applications for liquor licenses where the proposed establishments would be located within a certain distance from their premises. *Larkin* v. *Grendl's Den*, 103 S.Ct. 505 (1982). While noting that judicial deference to the legislative exercise of zoning powers by a city council or other legislative zoning body is especially appropriate in the area of liquor regulation because of the Twenty-first Amendment, the Court nonetheless held that the Massachusetts law violated the Establishment Clause of the First Amendment. *Id.* at 103 S.Ct. 510. "Under these circumstances the deference normally due a legislative zoning judgment is not merited." *Id.*

### B. The States Do Not Have Authority Under The Twenty-First Amendment To Completely Ban Protected Speech

In the decision below, the Court of Appeals for the Tenth Circuit acknowledged that "[t]he Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment." *Oklahoma Telecasters Association* v. *Crisp*, 699 F.2d 490, 498 (10th Cir. 1983). But having stated this, the Tenth Circuit then sought to generalize from cases which have permitted a state to exercise control over the sale or consumption of alcoholic beverages in a manner which may have impacted on speech and held that a state may directly prohibit *all* commercial speech in this area simply because the Twenty-first Amendment is involved. This is reflected in the Circuit Court's reliance upon *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981).

In *Bellanca*, nightclub and restaurant owners attacked a New York State prohibition on nude dancing in establishments licensed by the State to sell liquor for on-premise consumption. Superficially, *Bellanca* appears to support the contention that the Twenty-first Amendment requires added deference for broad-based state restrictions on First Amendment rights. But it is essential to recognize that the regulations at issue in *Bellanca* were directed at controlling the locations at which alcohol could be sold and consumed and did not attempt to effect a total ban on the protected expression itself. By contrast, the Oklahoma ban on alcoholic beverage advertising is a direct and pervasive prohibition of constitutionally protected speech which precludes all such expression within the state. If there is any deference to be paid under the Twenty-first Amendment to speech-related restrictions,

that latitude is necessarily narrow and does not extend to the complete suppression of protected speech.

Likewise, the Court below placed its heaviest reliance for its decision on this Court's summary dismissal of an appeal of the decision of the Ohio Supreme Court in *Queensgate Investment Co.* v. *Liquor Control Commission*, 69 Ohio St.2d 361, 43 N.E.2d 137 (1982), *appeal dismissed*, 103 S.Ct. 31 (1982). Obviously this case has limited precedential value because this Court never issued an opinion on the merits. But a close review of the Ohio Supreme Court's reasoning reveals that nowhere in its opinion did the Court suggest that the Ohio ban on advertising of alcoholic beverage prices was entitled to greater deference because of the Twenty-first Amendment. Rather, the Court reviewed the ordinance under a strict *Central Hudson* analysis. The sole reference to the Twenty-first Amendment arose in the context of using the Twenty-first Amendment as support for a finding that the state had a substantial interest in controlling alcohol consumption. *Queensgate*, *supra*, at 43 N.E.2d 142.

Even if *Queensgate* is viewed as a decision regarding permissible Twenty-first Amendment regulation which impacts on protected expression, the Ohio decision still does not lend support for a total advertising ban like that at issue in the instant case. Unlike Oklahoma's sweeping prohibition, the Ohio regulation was limited to proscriptions on off-premise price advertising of per drink or per bottle prices or of comparative prices by certain permit holders. Under the Ohio ordinance, permit holders could continue to advertise virtually any other information except price, and liquor distributors were not subject to any restrictions.

The Twenty-first Amendment provides no better justification for the complete suppression of protected speech than it does for the suppression of equal protection and due process rights or for evasions of the Establishment Clause. The First Amendment may not be so easily overcome.

## II. OKLAHOMA'S BAN ON ALCOHOLIC BEVERAGE ADVERTISING CANNOT BE SUSTAINED AS A PROPER REGULATION OF COMMERCIAL SPEECH

It is well settled that commercial speech is protected under the First Amendment. *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). In *Central Hudson Gas Co.* v. *Public Service Commission*, *supra*, this Court carefully delineated the narrow circumstances under which commercial speech may be regulated.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

*Central Hudson*, *supra* at 477 U.S. 566.

The Circuit Court misapplied this test because it intermeshed Twenty-first Amendment considerations within its First Amendment analysis. Thus, the Tenth Circuit found that Oklahoma's prohibitions conformed to the two final *Central Hudson* criteria "[w]hen the Twenty-first Amendment is considered in addition to Oklahoma's sub-

stantial interest under its police power. . . ." *Crisp, supra*, at 699 F.2d 502. In fact, this Court's Twenty-first Amendment decisions compel that a *Central Hudson* analysis of complete prohibitions of protected speech must be concluded free of Twenty-first Amendment taint. When viewed in that clearer light, Oklahoma's prohibitions simply do not pass constitutional muster.

### A. The Oklahoma Advertising Ban Does Not Directly Advance The State's Goal Of Reducing Alcohol Consumption

The District Court below correctly held that Oklahoma's ban[1] failed to satisfy the third part of the *Central Hudson* analysis since the ban does not directly advance Oklahoma's goal of temperance.

> The realities of the situation are that beer commercials have been permitted despite the ban; wine commercials are heard in Oklahoma on radio broadcasts which originate outside the state; beer, wine, and distilled spirits advertisements in magazines originating outside Oklahoma are permitted. The Court finds it hard to believe that the prohibition of advertising by Oklahoma media is a direct means of achieving temperance.

*Oklahoma Telecasters Association* v. *Crisp*, No. Civ-81-439-W (W.D. Ok. December 18, 1981).

The Tenth Circuit rejected the District Court's analysis and, deferring to the legislative judgments underlying the statute, limited its consideration to whether it was

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[1] Oklahoma has taken the position that its laws prohibit both interstate and intrastate advertising of intoxicating liquors, but that due to enforcement practicalities, it has not been able to pursue violations in the form of liquor advertisements included in out-of-state publications distributed in Oklahoma. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 1-2.

unreasonable for Oklahoma to believe that product advertising increases sales of alcoholic beverages generally, rather than just sales of the particular brands advertised. *Crisp, supra*, at 699 F.2d 501.

This asserted deference to legislative judgments is not supported by the decisions of this Court. In *Central Hudson, supra*, this Court specifically refused to give any presumptive effect to underlying legislative judgments. Thus, New York had asserted as one of its substantial interests that promotional advertising would aggravate inequities in the utility rate structures because of the failure to base rates on marginal costs. This Court accepted the premise that the state had a substantial governmental interest in assuring the fairness of utility rate structures, but then engaged in a searching and critical inquiry into whether there was a concrete link between the advertising restrictions at issue and that state interest. The Court concluded that the link was highly speculative. "Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising." *Central Hudson, supra*, at 447 U.S. 569.

In the recent decision in *Bolger* v. *Young Drug Products Corp.*, 103 S.Ct. 2875 (1983), this Court again looked behind ostensible legislative intent and conducted a searching analysis of whether a federal statutory ban on unsolicited contraceptive advertisements in the mail in fact furthered the governmental goal of aiding parents in controlling the manner their children become informed about birth control. There, the Court pointed out that these prohibitions should not be assessed in a vacuum and that the mail ban itself would not prevent children from receiving information from a host of other public information sources available to them in everyday life. *Id.* at 103 S.Ct. 2884.

In the instant case it is uncontested that Oklahoma residents are exposed to alcoholic beverage advertising from out-of-state media. Under these circumstances, it strains credulity to think that Oklahoma's total ban on intrastate advertising communications has more than a minimal and indirect effect—if it has any effect at all—on total alcohol consumption. Oklahoma's alcohol advertising prohibitions simply do not directly advance the State's interest in controlling consumption of alcoholic beverages and they cannot be accepted on face value as was done below.

### B. The Oklahoma Advertising Ban Is Unconstitutional Because It Is More Restrictive Than Necessary To Further The State's Interest In Temperance

Regulations that suppress protected commercial speech must be no more extensive than necessary to serve an asserted governmental interest. *Central Hudson*, *supra*, at 447 U.S. 566. A flat ban on an entire category of protected commercial speech can only survive this test with the utmost difficulty. In *Central Hudson*, the Court struck down a blanket prohibition on promotion by electric utilities as being more restrictive than necessary to further the State's goal of energy conservation. The Court stated that "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interest." *Central Hudson*, *supra* at 447 U.S. 570. The Court even suggested some less restrictive alternatives to an advertising ban and concluded, "[i]n the absence of a showing that more limited regulations would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising." *Id.* at 447 U.S. 571. Likewise, in *In re R.M.J.*, 455 U.S. 191 (1982), this Court reviewed certain Missouri restrictions that prohibited lawyers

from sending announcements to more than a limited group of people in order to prevent "deception." This restriction was struck down as more restrictive than necessary. The Court pointed out that it was not clear that an absolute prohibition was the only solution to this problem and that there was no indication in the record "of a failed effort to proceed along such a less restrictive path." *In re R.M.J.*, *supra* at 455 U.S. 201.

Oklahoma's ban on alcohol advertising cannot be justified as being no more extensive than necessary to further the State's goal of temperance. First, there has been no showing that less restrictive measures would be ineffective, as required by *Central Hudson*, *supra*. Also, there is no indication of a failed effort to proceed along a less restrictive path. Moreover, to the extent that the Twenty-first Amendment has any relevance in this case, it is because the Amendment gives Oklahoma far more comprehensive police power to control alcohol sale and use than might otherwise be permitted under the Commerce Clause. In applying the *Central Hudson* analysis, the existence of that expanded police power places a greater burden on the state to justify the complete suppression of protected speech when a broad array of other measures that directly regulate sales and consumption are well within the states authority. Clearly Oklahoma has failed to carry that burden and has not even approached exhausting the spectrum of alternative controls available to it short of this total ban of commercial speech. The Oklahoma ban is not the least restrictive of the measures available to the State for achieving its goals of controlling alcohol consumption.

## CONCLUSION

Oklahoma has banned alcoholic beverage advertising from all intrastate media and aspires to extend the ban to

the dissemination of such advertising in out-of-state media disseminated on cable TV within the state. The Twenty-first Amendment provides no support for giving greater deference to this suppression of protected commercial speech than to any other regulation of commercial speech. The Oklahoma advertising prohibition is unconstitutional under the First Amendment because it does not directly advance the State's goal of fostering temperance and it is far more restrictive than necessary to achieve that end, particularly because of the broad ambit of non-speech related measures available to the state to control alcoholic beverages.

Respectfully submitted,

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*Attorneys for The American Advertising Federation, American Association of Advertising Agencies, Association of National Advertisers and Outdoor Advertising Association of America*

November 17, 1983

# APPENDIX

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

November 14, 1983

*By Hand*

Eric Rubin, Esquire
Rubin, Winston & Diercks
1730 M Street, N.W.
Suite 708
Washington, D.C. 20036

Re: Capital Cities Cable, Inc., *et al.* v. *Crisp*, *No. 82-1795 (U.S. Supreme Court)*

Dear Mr. Rubin:

Petitioner Capital Cities Cable, Inc. hereby consents to the filing by the American Advertising Association, *et al.*, of a brief *amicus curiae* in the above-entitled case.

Sincerely,

/s/ TIMOTHY DYK
Timothy Dyk

DOW, LOHNES & ALBERTSON
Attorneys at Law
1225 Connecticut Avenue
Washington, D.C. 20036

November 14, 1983

*By Hand*

Walter Diercks, Esquire
Rubin, Winston & Diercks
1730 M Street, N.W.
Suite 708
Washington, D.C. 20036

Re: Capital Cities Cable, Inc. v. Crisp, *No. 82-1795 (U.S. Supreme Court)*

Dear Mr. Diercks:

Petitioners, Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc. and Sammons Communications, Inc., consent to the filing by the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, and the Outdoor Advertising Association of America of an amicus brief in the above-entitled case.

Sincerely,

/s/ DAVID P. FLEMING
David P. Fleming

DPF/gls

MICHAEL C. TURPEN
Attorney General
State of Oklahoma
State Capitol, Oklahoma City, Oklahoma 73105

November 7, 1983

Walter E. Diercks
1730 M Street, N.W.
Suite 708
Washington, D.C. 20036

Re: *Capital Cities Cable, Inc., et al.* v. *Crisp, No. 82-1795*

Dear Mr. Diercks,

In response to your letter dated November 1, 1983, consent is hereby given that the American Advertising Federation, American Association of Advertising Agencies, Association of National Advertisers and Outdoor Advertising Association of America may file briefs amicus curiae in the above captioned case.

Please feel free to contact me if I can be of further assistance.

Sincerely,

/s/ ROBERT L. MCDONALD, ESQUIRE
Robert L. McDonald, Esquire
First Assistant Attorney General

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